

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:5:KCY:GL-122064-01
MLBoman

date: JUN 04 2001

to: Offer-In-Compromise Group
Attention: Rob Kyle

from: Associate Area Counsel, Kansas City
(Small Business/Self-Employed: Area 5)

subject: **Offers-in-Compromise on Behalf of Deceased Taxpayers**

This is in response to issues raised during the review of the Offer-in-Compromise made on behalf of [REDACTED] - deceased. [REDACTED] submitted a Form 56, Notice Concerning Fiduciary Relationship. Under Part II (Authority), [REDACTED] checked "other" and described his authority as "surviving spouse." Attached to the Form 56 is a document captioned "Affadavit" (sic), which states:

comes now and makes the following ascertains concerning the Estate of

1. I am the spouse of the decedent at the time of death on [REDACTED].
2. [REDACTED] died intestate.
3. No filings were required under Missouri Law concerning the establishment of an executor or other fiduciary for the estate.
4. I am the sole distributee of all the assets from my spouse estate. As sole distributee I have the power to represent him/her or the estate in a fiduciary capacity.

I attest that the above assertions are correct and freely made by me and that I am authorized to represent [REDACTED], Deceased, in matters before the United States Tax Court under Rule 60 and IRS Regulations 601.503(d)(3)(iv). Further that I am authorized to execute Form 56, "Notice concerning Fiduciary Relationship".

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- It is our understanding that this affidavit is commonly used. The origin of the form of the affidavit is however unknown.

Compromises are controlled by the laws governing contracts. Accordingly, compromises require parties capable of entering into a contract. IRM 35.18.20.2. In the event of a deceased taxpayer, the executor, administrator, or personal representative appointed by the Court is generally a fiduciary capable of binding the estate.

In the event that there is no administrator, Treas. Reg. § 601.503(3)(iv) provides as follows:

Distributee(s). In the event that the decedent died intestate and the administrator has been discharged and is not responsible for disposition of the matter (or none was ever appointed), a form 56, "Notice Concerning Fiduciary Relationship," should be filed by the distributee(s). Internal Revenue Service officials may require the submission of evidence of the discharge of the administrator (if one had been appointed) and evidence that the administrator is not responsible for disposition of the matter. It also may require a statement(s) signed under penalty of perjury (and such other appropriate evidence as can be produced) to show the relationship of the individual(s) who sign the form 56, "Notice concerning Fiduciary Relationship," to the decedent and the right of each signer to the respective shares of the assets claimed under the domicile of the decedent.

The question of who is authorized to represent a deceased individual is a question of state law. As a general rule, the person authorized is the executor, administrator, or personal representative. A surviving spouse does not normally have capacity to represent a decedent. See Fehrs v. Commissioner, 65 T.C. 346 (1975) (Nebraska law); Davison v. Commissioner, 13 T.C. 554 (1949) (Florida law); Marcos v. Commissioner, T.C. Memo 1994-528 (Hawaii and Phillipines law); Estate of Hughey v. Commissioner, T.C. Memo 1987-383 (Oklahoma law). But see Estate of Lawrence E. Berry v. Commissioner, 41 T.C. 702 (1964) (Texas law). Generally, the proper course is to have a personal representative appointed by the probate court. See Krantz v. Commissioner, T.C. Memo 1992-396.

You have taxpayers from both Kansas and Missouri. Therefore it is necessary to examine the laws of both states.

Under Missouri law, the power to prosecute and defend actions is granted to the executor or administrator of the estate. Mo. Ann. Stat. § 473.270 (Vernon 1992). A decedent's estate can act only by and through the decedent's personal representative. In re Cromwell, 522 S.W.2d 36, 41 (Mo. 1975); Steiner v. Vatterott, 973 S.W.2d 191 (Mo. App. 1998); Scott v. Flynn, 946 S.W.2d 248, 253 (Mo. App. 1997); Britton-Paige v. American Health and Life Insurance Co., 900 S.W.2d 7 (Mo. App. 1995); Estate of Lemaster v. Hackley, 750 S.W.2d 692, 694 (Mo. App. 1988).

Missouri law does provide for dispensing with administration in certain small estates. If the estate of the decedent is not greater than the amounts of exempt property and the family allowance, then the probate court may refuse to grant letters of administration.¹ "After the making of the order" the surviving spouse may sue for personal property of the estate as if she had been qualified as executor or administrator. Mo. Ann. Stat. § 473.090(3) (Vernon Supp. 2001). If real estate is involved, the surviving spouse may file a copy of the order denying letters of administration with the recorder of deeds. Mo. Ann. Stat. § 473.090(5) (Vernon Supp. 2001).

In the case that we reviewed, we saw no evidence that the Court had actually issued an order denying letters of administration. More significantly, we believe that the powers devolving to the surviving spouse absent administration are extremely limited and do not include the power to prosecute or compromise a tax claim. Compare Mo. Ann. Stat. § 537.021 (Vernon 2000) (Court shall appoint personal representative for purpose of prosecuting or defending action for personal injury).

Kansas also has statutory authority for dispensing with administration in the case of small estates. Kan. Stat. Ann. § 59-2287. As in Missouri, it is contemplated that there will be court action resulting in an order that no letters of administration be issued. There is nothing however in Kansas

¹There are also procedures for creditors seeing the dispensing with administration in the case of certain small estates with no surviving spouse or unmarried minor children. We do not believe these provisions are likely to be relevant to the Offer-in-Compromise issues.

- law, that places the powers of an administrator in the surviving spouse.²

It is extremely unlikely that a representative of a deceased taxpayer would ever attempt to overturn the compromise.³ Likewise, it is extremely unlikely that the Service would seek to overturn an offer that it had accepted. It is our conclusion that in Missouri and Kansas the surviving spouse of a deceased individual has no capacity to enter in to a binding offer in compromise with the Service, unless appointed as the personal representative of the estate. It is therefore our recommendation that the surviving spouse submit any offer in his own name or alternatively have a personal representative appointed for purposes of compromising the liabilities.

No further action is currently required of this office, and we are closing our file.

(signed) Michael L. Boman

MICHAEL L. BOMAN
Senior Attorney

²Former section 59-2287(c) provided similarly to Missouri law that the surviving spouse or minor children could sue for personal property as if an executor or administrator. See In re Teichgraber, 217 Kan. 373, 537 P.2d 174 (1975). That subsection has since been repealed.

³Although unlikely it is within the range of possibilities. For instance, a personal representative could be appointed to pursue an innocent spouse refund claim for taxes paid by the decedent. A valid offer-in-compromise would in our opinion preclude the action, whereas an invalid offer would not.